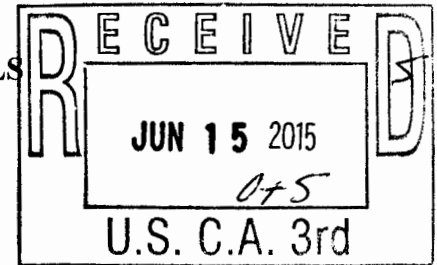


15-2466

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT



1621 ROUTE 22 WEST OPERATING  
COMPANY, LLC d/b/a SOMERSET VALLEY  
REHABILITATION AND NURSING CENTER,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

1199 SEIU UNITED HEALTHCARE  
WORKERS EAST, NEW JERSEY REGION,

Party in Interest.

Case No. \_\_\_\_\_

Case Nos. 22-CA-029599,  
22-CA-029628, and 22-CA-029868

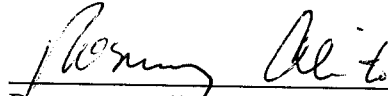
362 NLRB No. 113 (June 11, 2015)

**PETITION FOR REVIEW OF AN ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD**

1621 Route 22 West Operating Company, LLC d/b/a Somerset Valley Rehabilitation and Nursing Center hereby petitions this Honorable Court for review of the Decision and Order of the National Labor Relations Board dated June 11, 2015, Case Nos. 22-CA-029599, 22-CA-029628, and 22-CA-029868, 362 NLRB No. 113, a copy of which is attached as Exhibit A.

Respectfully submitted,

**K&L GATES LLP**

A handwritten signature in dark ink, appearing to read "Rosemary Alito", is written over a horizontal line.

Rosemary Alito  
George P. Barbatsuly  
One Newark Center, Tenth Floor  
Newark, New Jersey 07102  
973-848-4000  
[rosemary.alito@klgates.com](mailto:rosemary.alito@klgates.com)

Attorneys for Petitioner  
1621 Route 22 West Operating Company, LLC d/b/a  
Somerset Valley Rehabilitation and  
Nursing Center

Dated: June 12, 2015

Exhibit

A

*NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.*

**1621 Route 22 West Operating Company, LLC d/b/a Somerset Valley Rehabilitation and Nursing Center and 1199 SEIU United Healthcare Workers East, New Jersey Region.** Cases 22–CA–029599, 22–CA–029628, and 22–CA–029868

June 11, 2015

# DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA  
AND MCFERRAN

On September 26, 2012, the Board issued a Decision and Order in this proceeding, which is reported at 358 NLRB No. 146. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the Third Circuit, and the General Counsel filed a cross-application for enforcement.

At the time of the Decision and Order, the composition of the Board included two persons whose appointments had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the court of appeals vacated the Board's Decision and Order and remanded this case for further proceedings consistent with the Supreme Court's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.<sup>1</sup>

In view of the decision of the Supreme Court in *NLRB v. Noel Canning*, supra, we have considered de novo the judge's decision and the record in light of the exceptions and briefs. We have also considered the now-vacated Decision and Order, and we agree with the rationale set forth therein. Accordingly, we affirm the judge's rulings, findings, and conclusions and adopt the judge's recommended Order to the extent and for the reasons stated in the Decision and Order reported at 358 NLRB No. 146, which is incorporated herein by reference.<sup>2</sup> The

<sup>1</sup> The Respondent has filed a motion to recuse Chairman Pearce from this proceeding on the ground that his chief counsel, Ellen Dichner, while in earlier private practice, represented the Charging Party Union in this case up to the exceptions stage. Ms. Dichner has taken no part in the Board's consideration of this case. The motion is therefore denied.

<sup>2</sup> The prior decision cited *Evenflow Transportation*, 358 NLRB No. 82 (2012), which was also decided at a time when the composition of the Board included two persons whose appointments were not valid. Subsequently, however, a panel of a fully confirmed Board affirmed *Evenflow*. See 361 NLRB No. 160 (2014).

judge's recommended Order, as further modified herein, is set forth in full below.

## REMEDY

We adopt the judge's recommended remedy set forth in the Decision and Order reported at 358 NLRB No. 146. In addition, in light of events following the issuance of the Board's now-vacated decision, we briefly address the remedial reinstatement of employees Jillian Jacques and Valerie Wells. Before doing so, however, we emphasize our agreement with the findings made in the prior decision that the Respondent unlawfully discharged these employees. The following paragraphs concern only our further agreement with the prior decision that Jacques and Wells are entitled to full reinstatement and backpay.

### I.

After the judge issued his decision, the General Counsel successfully petitioned the United States District Court for the District of New Jersey for an order, under Section 10(j) of the Act, requiring, among other things, the interim reinstatement of alleged discriminatees Shannon Napolitano and Sheena Claudio. The district court, however, declined to order interim reinstatement for Jacques and Wells on the ground that their alleged deficiencies in job performance threatened the public interest in patient safety at the Respondent's facility. The Respondent and the then-Acting General Counsel each appealed the district court's decision to the United States Court of Appeals for the Third Circuit.

While the 10(j) appeals were pending, the Board issued its now-vacated Decision and Order, finding that the Respondent unlawfully discharged all four of the discriminatees. The Board rejected both the Respondent's claim that the employees had been discharged based on alleged performance deficiencies and its claim that, even if the discharges were unlawful, the same deficiencies warranted denying the employees reinstatement because their reinstatement would endanger public safety. The Board pointed out that because "virtually all" of the discipline imposed for the alleged deficiencies cited by the Respondent had been unlawfully motivated, the Respondent was foreclosed from relying on that discipline as a basis for denying the employees reinstatement with full backpay. 358 NLRB No. 146, slip op. at 3-4.

The Board acknowledged the district court's interim refusal to reinstate Jacques and Wells, but explained that it was not bound by that ruling because of the differences

We shall modify the judge's recommended Order to conform to our recent decision in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014). We shall also substitute a new notice in accordance with *Durham School Services*, 360 NLRB No. 85 (2014).

in the standards applied in a 10(j) proceeding for interim relief and the standards applied in the Board's determination of the merits and appropriate remedy. *Id.* at 4, fn. 12. The Board did not specifically address the particular allegations against Jacques and Wells that motivated the district court to deny them interim reinstatement.

Following the issuance of the Board's decision, the Acting General Counsel moved the Third Circuit to vacate, as moot, the district court's decision and order in the 10(j) proceeding. The court of appeals granted that request, but in response to the Respondent's objection it noted that vacating the district court's decision would have "no effect on the existence or record of the proceedings before it," and would not "hinder [the Respondent] from relying on appropriate facts in the District Court record." Thus, it appears that the Respondent, if it contests Jacques' and Wells' reinstatement in an enforcement proceeding, may rely on those particular facts that caused the district court concern over their interim reinstatement. For that reason, we take this opportunity to more specifically address those facts under the Board's well-established remedial standard.

## II.

Where, as here, an employer claims that an unlawfully discharged employee is not entitled to reinstatement based on alleged misconduct occurring before her discharge, it is the employer's burden to prove that the employee engaged in that misconduct and that it would have disqualified any similarly situated employee from continued employment. See *Marshall Durbin Poultry Co.*, 310 NLRB 68, 69-70 (1993), *enfd.* in pertinent part 39 F.3d 1312 (5th Cir. 1994). Specifically, the employer must "establish that the discriminatee's conduct would have provided grounds for termination based on a preexisting lawfully applied company policy and any ambiguities will be resolved against the employer." *John Cuneo, Inc.*, 298 NLRB 856, 857 fn. 7 (1990).<sup>3</sup>

Inherent in this burden is the premise that the employer was not aware of the employee's alleged misconduct *before* her discharge. For if the employer was so aware, but either did not rely on the misconduct in discharging the employee or establish that it would have discharged the employee for the misconduct even in the absence of her protected activity, then the employer necessarily cannot show that the misconduct would have disqualified the discriminatee from reinstatement. See *High Performance Tube*, 251 NLRB 1362, 1362 (1980), *enfd.* 640 F.2d 382 (5th Cir. 1981).

## III.

Applying those principles, we find that the Respondent cannot show that Jacques or Wells should be denied reinstatement, even considering the specific concerns raised by the district court. In refusing to order the interim reinstatement of Jacques, the district court singled out one occasion when her failure to assess a patient's pain upon admission to the facility led to "very severe" harm to the patient. That incident, however, occurred more than a year before Jacques' discharge. Moreover, the Respondent was fully aware of the incident at the time, yet permitted Jacques to continue working for more than a year thereafter. For this reason alone, the Respondent cannot now rely on the incident to defeat Jacques' right to reinstatement. See *High Performance Tube*, above, 251 NLRB at 1362.

But, even if we were to consider Jacques' alleged error on that occasion, we would find that the Respondent has not shown that it would have disqualified her from continued employment. As did the Board in the now-vacated decision, we find it significant that Jacques was a very senior nurse, and that during the 2 years immediately preceding her discharge, the Respondent frequently designated her a "charge nurse" with additional responsibilities. The Respondent's witnesses acknowledged that nurses selected to be charge nurses were required to be experienced and dependable. In other words, the Respondent, both before and after the incident in question, repeatedly placed Jacques in a position reserved for high-performing nurses. This confirms that the Respondent itself did not actually consider Jacques a threat to patient safety, and that the incident was not a disqualifying event.

With respect to Wells, the Respondent's designated "staffing coordinator," the district court denied the request for interim reinstatement based on several scheduling errors that caused potential staffing gaps. The district court found it significant that one of the Respondent's expert witnesses testified in the injunction proceeding that scheduling problems are "the single most frequent cause of abuse and neglect" in facilities like the Respondent's. Even accepting that generalization as accurate, we do not find it helpful in answering the question whether the Respondent has established that it would have disqualified any employee who made such scheduling errors in similar circumstances.

To answer that question, we look to the Respondent's actual reaction to Wells' alleged errors. As the administrative law judge noted, the Respondent claimed that

<sup>3</sup> This appropriately is a demanding standard because, at the remedial stage of a case, the respondent's unlawful conduct already has been firmly established. See *Coronet Foods, Inc. v. NLRB*, 981 F.2d 1284, 1287 (D.C. Cir. 1993).

## SOMERSET VALLEY REHABILITATION &amp; NURSING CENTER

3

Wells made scheduling errors during the month before the election in this case, but the Respondent did not discipline her for those errors.<sup>4</sup> Moreover, although the Respondent cited Wells' alleged postelection scheduling errors as the basis for her discharge, we have affirmed the prior Board's finding that the Respondent failed to establish that it would have discharged Wells for those errors absent her protected activity. So, here too, any attempt by the Respondent to defeat Wells' reinstatement would rely on alleged misconduct that the Respondent has already failed to prove warranted her discharge.

In short, the Respondent, by its own actions, has demonstrated that Jacques' and Wells' alleged performance deficiencies did not warrant excluding them from continued employment. Accordingly, we will order Jacques and Wells reinstated with full backpay.

## ORDER

The Respondent, 1621 Route 22 West Operating Company, LLC d/b/a Somerset Valley Rehabilitation and Nursing Center, Bound Brook, New Jersey, its officers, agents, successors, and assigns, shall

## 1. Cease and desist from

(a) Interrogating its employees about their union membership, sympathies, and/or activities.

(b) Soliciting employee complaints and grievances, thereby promising its employees increased benefits and improved terms and conditions of employment if they refrained from union organizational activities.

(c) Issuing written warnings to employees because of their union membership, sympathies, and/or activities.

(d) Suspending, discharging, or otherwise discriminating against any employee for supporting 1199 SEIU United Healthcare Workers East, New Jersey Region, or any other labor organization.

(e) Accelerating the resignation dates of employees because of their union membership, sympathies, and/or activities.

(f) Reducing the hours of per diem employees because of their union membership, sympathies, and/or activities.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

## 2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the this Order, offer Sheena Claudio, Jillian Jacques, Shannon Napolitano,

and Valarie Wells full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make employees Sheena Claudio, Jillian Jacques, Shannon Napolitano, Valarie Wells, Lynette Tyler, Daysi Aguilar, Dominique Joseph, Rita Onyeike, Gertrudis Rodriguez, and Annie Stubbs whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Compensate Claudio, Jacques, Napolitano, Wells, Tyler, Aguilar, Joseph, Onyeike, Rodriguez, and Stubbs for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award for each to the appropriate calendar quarters.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful employment actions taken against the employees named above, and within 3 days thereafter notify the employees in writing that this has been done and that the unlawful employment actions will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Bound Brook, New Jersey facility, copies of the attached notice marked "Appendix."<sup>5</sup> Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or

<sup>4</sup> In fact, the Respondent had not disciplined Wells for any performance errors in the 5 years she had held her position. It was not until shortly after the Union won the election, with Wells' public support, that her errors began to trigger the quick succession of disciplinary warnings that culminated in her termination within a period of only 8 days.

<sup>5</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 1, 2010.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 22 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 11, 2015

\_\_\_\_\_  
Mark Gaston Pearce, Chairman

\_\_\_\_\_  
Kent Y. Hirozawa, Member

\_\_\_\_\_  
Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX  
NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT question you about your union membership, sympathies, and/or activities.

WE WILL NOT solicit your complaints and grievances, thereby promising you increased benefits and improved

terms and conditions of employment if you refrain from union organizational activities.

WE WILL NOT issue written warnings to you because of your union membership, sympathies, and/or activities.

WE WILL NOT suspend, discharge, or otherwise discriminate against you for supporting 1199 SEIU United Healthcare Workers East, New Jersey Region, or any other labor organization.

WE WILL NOT accelerate your resignation date because of your union membership, sympathies, and/or activities.

WE WILL NOT reduce the hours of employees, including per diem employees because of your union membership, sympathies, and/or activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Sheena Claudio, Jillian Jacques, Shannon Napolitano, and Valarie Wells full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make employees Sheena Claudio, Jillian Jacques, Shannon Napolitano, Valarie Wells, Lynette Tyler, Daysi Aguilar, Dominique Joseph, Rita Onyeike, Gertrudis Rodriguez, and Annie Stubbs whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL compensate Claudio, Jacques, Napolitano, Wells, Tyler, Aguilar, Joseph, Onyeike, Rodriguez, and Stubbs for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award for each to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful employment actions taken against the employees named above, and WE WILL within 3 days thereafter notify them in writing that this has been done and that the unlawful employment actions will not be used against them in any way.

1621 ROUTE 22 WEST OPERATION CO., LLC D/B/A  
SOMERSET VALLEY REHABILITATION AND  
NURSING CENTER

SOMERSET VALLEY REHABILITATION & NURSING CENTER

5

The Board's decision can be found at [www.nlr.gov/case/22-CA-029599](http://www.nlr.gov/case/22-CA-029599) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.





**CERTIFICATE OF SERVICE**

I hereby certify that on this 12th day of June, 2015, I caused true and correct copies of the foregoing Petition for Review to be deposited in the U.S. Mail, first class postage prepaid, addressed to:

Lester A. Heltzer  
Executive Secretary  
National Labor Relations Board  
1099 14<sup>th</sup> Street, N.W.  
Washington, DC 20570  
[lester.heltzer@nrlb.gov](mailto:lester.heltzer@nrlb.gov)

Linda A. Dreeben, Esq.  
Deputy Associate General Counsel  
Appellate and Supreme Court Litigation Branch  
National Labor Relations Board  
1099 14<sup>th</sup> Street, N.W.  
Washington, DC 20570  
[appellatecourt@nrlb.gov](mailto:appellatecourt@nrlb.gov)

J. Michael Lightner, Regional Director  
National Labor Relations Board, Region 22  
20 Washington Place, 6<sup>th</sup> Floor  
Newark, NJ 07102-3115  
[michael.lightner@nrlb.gov](mailto:michael.lightner@nrlb.gov)

William S. Massey, Esq.  
Gladstein, Reif & McGinniss, LLP  
817 Broadway, 6<sup>th</sup> Floor  
New York, NY 10003  
[wmassey@grmny.com](mailto:wmassey@grmny.com)

---

GEORGE P. BARBATSULY